

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSEPH MARTIN NORTON, III,

Petitioner,

v.

WILLIAM HUTCHINGSON, et al.,

Respondents.

Case No. 2:23-cv-01357-RFB-VCF

ORDER

Petitioner Joseph Martin Norton, III, a *pro se* Nevada prisoner, commenced this habeas action by filing a Petition for Writ of Habeas Corpus. ECF No. 1-1. This habeas matter is before the Court for initial review under the Rules Governing Section 2254 Cases,¹ as well as consideration of Petitioner’s Application to Proceed *In Forma Pauperis* (“IFP”). ECF No. 1. For the reasons discussed below, the Court directs service of the petition, instructs Respondents to respond, and grants Petitioner’s IFP Application.

I. IFP Application

The Court considered Petitioner’s IFP application along with the attached financial documents and concludes that he cannot pay the \$5.00 filing fee. The IFP application (ECF No. 1) will therefore be granted.

II. Background

Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition and order a response unless it “plainly appears” that the petitioner is not entitled to relief. See Valdez v. Montgomery, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by procedural defects. Boyd v. Thompson, 147 F.3d 1124, 1128 (9th Cir. 1998); Hendricks v.

¹ All references to a “Habeas Rule” or the “Habeas Rules” in this order identify the Rules Governing Section 2254 Cases in the United States District Courts.

1 Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases).

2 Petitioner challenges a conviction and sentence imposed by the Eighth Judicial District
3 Court for Clark County (“state court”). State of Nevada v. Norton, Case No. C-20-350201-1.² On
4 February 5, 2021, the state court entered a judgment of conviction for robbery and conspiracy to
5 commit robbery. Petitioner did not file a timely appeal of the judgment of conviction.

6 On April 7, 2022, Petitioner filed a state petition for writ of habeas corpus. The state court
7 denied post-conviction relief. Petitioner filed a post-conviction appeal. The Nevada Supreme Court
8 found his petition was procedurally time barred and denied relief on June 13, 2023. On August
9 31, 2023, Petitioner initiated this federal habeas case. ECF No. 1.

10 **III. Discussion**

11 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) establishes a one-year
12 limitation period for state prisoners to file a federal habeas petition pursuant to 28 U.S.C. § 2254.
13 The one-year limitation period, *i.e.*, 365 days, begins to run from the latest of four possible
14 triggering dates, with the most common being the date on which the petitioner’s judgment of
15 conviction became final by either the conclusion of direct appellate review or the expiration of the
16 time for seeking such review. Id. § 2244(d)(1)(A). For a Nevada prisoner who pursues a direct
17 appeal, his conviction becomes final when the 90-day period for filing a petition for certiorari in
18 the United States Supreme Court expires after a Nevada appellate court enters judgment or the
19 Nevada Supreme Court denies discretionary review. See Harris v. Carter, 515 F.3d 1051, 1053 n.1
20 (9th Cir. 2008); Shannon v. Newland, 410 F.3d 1083, 1086 (9th Cir. 2005); Sup. Ct. R. 13.

21 The AEDPA limitations period is tolled while a “properly filed” state post-conviction
22 proceeding or other collateral review is pending. 28 U.S.C. § 2244(d)(2). However, an untimely
23 state petition is not “properly filed” and thus does not toll the federal statute of limitations. Pace
24 v. DiGuglielmo, 544 U.S. 408, 417 (2005).

25 Here, Petitioner did not file a direct appeal. Thus, his conviction became final when the

26 ² The Court takes judicial notice of the online docket records of the Eighth Judicial District Court
27 and Nevada appellate courts. The docket records may be accessed by the public online at:
28 <https://www.clarkcountycourts.us/Anonymous/default.aspx> and
at: <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 time expired for filing a notice of appeal with the Nevada appellate courts on March 7, 2021. The
2 AEDPA statute of limitations thus began to run the following day and expired 365 days later on
3 March 7, 2022. Although Petitioner filed his state habeas petition on April 7, 2022, it was filed
4 after the expiration of the AEDPA limitations period and thus could not have tolled an already
5 expired deadline. See Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

6 Because the state petition was not timely under Nevada law, it was not “properly filed” for
7 the purposes of tolling the AEDPA deadline. See Pace, 544 U.S. at 417. Therefore, without another
8 basis for tolling or delayed accrual, the AEDPA deadline expired on March 7, 2022, and
9 Petitioner’s federal petition, filed more than one year later, is untimely on its face. Accordingly,
10 Petitioner must show cause why his petition should not be dismissed with prejudice as time-barred
11 under § 2244(d).

12 In this regard, Petitioner is informed that the one-year limitation period may be equitably
13 tolled. Equitable tolling is appropriate only if the petitioner can show that: (1) he has been pursuing
14 his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented
15 timely filing. Holland v. Florida, 560 U.S. 631, 649 (2010). Equitable tolling is “unavailable in
16 most cases,” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999), and “the threshold necessary
17 to trigger equitable tolling is very high, lest the exceptions swallow the rule,” Miranda v. Castro,
18 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7th
19 Cir. 2000)). The petitioner ultimately has the burden of proof on this “extraordinary exclusion.”
20 Miranda, 292 F.3d at 1065. He accordingly must demonstrate a causal relationship between the
21 extraordinary circumstance and the lateness of his filing. E.g., Spitsyn v. Moore, 345 F.3d 796,
22 799 (9th Cir. 2003). Accord Bryant v. Arizona Attorney General, 499 F.3d 1056, 1061 (9th Cir.
23 2007).

24 Petitioner further is informed that, under certain circumstances, the one-year limitation
25 period may begin running on a later date or may be statutorily tolled. See 28 U.S.C. §
26 2244(d)(1)(B), (C), (D) & (d)(2).

27 Petitioner further is informed that if he seeks to avoid application of the limitation period
28 based upon a claim of actual innocence, he must come forward with new reliable evidence tending

1 to establish actual factual innocence, *i.e.*, tending to establish that no juror acting reasonably would
2 have found him guilty beyond a reasonable doubt. See McQuiggin v. Perkins, 569 U.S. 383 (2013);
3 House v. Bell, 547 U.S. 518 (2006); Lee v. Lampert, 653 F.3d 929 (9th Cir. 2011) (en banc). In
4 this regard, “‘actual innocence’ means factual innocence, not mere legal insufficiency.” Bousley
5 v. United States, 523 U.S. 624, 623 (1998).

6 **IV. Conclusion**

7 **IT IS THEREFORE ORDERED** that Petitioner Joseph Martin Norton, III’s Application
8 to Proceed *In Forma Pauperis* (ECF No. 1) is GRANTED.

9 IT IS FURTHER ORDERED that that Petitioner must show cause in writing within 45
10 days of the date of entry of this order why this action should not be dismissed as untimely. If
11 Petitioner does not timely respond to this order, the petition may be dismissed with prejudice
12 without further notice. If Petitioner responds but fails to show specific, detailed, and competent
13 evidence why the petition should not be dismissed as untimely, the action will be dismissed with
14 prejudice. Unsupported assertions of fact will be disregarded.

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16 DATED: December 7, 2023.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE